(2)

No. 92-951

Supreme Court, U.S.
FILED
DEC. 18 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

N. WALTER GOINS,

Petitioner,

v.

DALE W. LANG, *et al.*,

Respondents.

Response Of Syndicated Communications, Inc., Syncom Capital Corporation, and Broadcast Capital, Inc. To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

MICHAEL D. HAYS*
DOW, LOHNES & ALBERTSON
Suite 500
1255 23rd St., N.W.
Washington, D.C. 20037
(202) 857-2500

MICHAEL BERENS
KELLY & BERENS, P.A.
3270 IDS Center
Minneapolis, MN 55402
(612) 349-6171

Counsel For Respondents Syndicated Communications, Inc., Syncom Capital Corporation, and Broadcast Capital, Inc.

**Counsel Of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8380

BEST AVAILABLE COPY

21pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the routine dismissal for lack of jurisdiction by the United States Court of Appeals for the Eighth Circuit of petitioner's premature appeal of the district court's interlocutory order denying a default judgment presents an appropriate question for issuance of a writ of certiorari, when: (a) there is no conflict amongst the courts of appeals with respect to this issue; and (b) the Eighth Circuit's dismissal of petitioner's interlocutory appeal of the denial of a default judgment was unquestionably correct.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS	2
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
A. The Complaint.	2
B. The Removal To Bankruptcy Court.	3
C. The Motion To Dismiss.	3
D. The Application For A Default Judgment.	4
E. Appeal Of The Interlocutory Order Denying Default.	5
F. Final Judgment And The Pending Eighth Circuit Appeal.	5
SUMMARY OF THE ARGUMENT	6
REASONS WHY THE WRIT SHOULD BE DENIED	6
A. The Eighth Circuit's Routine Dismissal Of Goins's Premature Appeal Of An Interlocutory Order Raises No Issues For Which A Writ Of Certiorari Should Issue.	6
B. The Issue With Respect To Which A Writ of Certiorari Is Sought Is Presently Before The Eighth Circuit In A Separate Pending Appeal.	7
CONCLUSION	8
APPENDICES	
RESPONDENTS' APPENDIX A	1a
District Court Order Dated May 26, 1992 Denying Goins's Application For A Default Judgment.	

RESPONDENTS' APPENDIX B 3a

Goins's Notice Of Appeal Dated June 12, 1992 From District Court Order Dated May 26, 1992 Denying Goins's Application For A Default Judgment.

RESPONDENTS' APPENDIX C 4a

Motion Of Banking Respondents To Dismiss Appeal For Lack Of Jurisdiction.

RESPONDENTS' APPENDIX D 6a

Goins's Notice Of Appeal Of Judgment Of District Court Dated October 13, 1992 Granting Summary Judgment.

TABLE OF AUTHORITIES

Cases	Page
Adult Film Ass'n of America v. Thetford, 776 F.2d 113 (5th Cir. 1985)	7
Bird v. Reese, 875 F.2d 256 (9th Cir. 1989)	6
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	7
McNutt v. Cardox Corp., 329 F.2d 107 (6th Cir. 1964)	7
Statutes	
18 U.S.C. § 1961 et seq.	3
28 U.S.C. § 1291	2,6
42 U.S.C. §§ 1983, 1985	3
Rules	
Rule 10, Sup. Ct. Rules	7
Rule 29, Sup. Ct. Rules	1
Rule 42, Sup. Ct. Rules	8
Bankruptcy Rule 7012(b)	4
Bankruptcy Rule 9027	3
Other Authorities	
15A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3914.5 (2d ed. 1986)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-951

N. WALTER GOINS,

Petitioner,

v.

DALE W. LANG, *et al.*,

Respondents.

Response Of Syndicated Communications, Inc., Syncom Capital Corporation, And Broadcast Capital, Inc. To Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF IN OPPOSITION

Respondents Syndicated Communications, Inc. ("Syndicated Communications"), its subsidiary Syncom Capital Corp. ("Syncom"), and Broadcast Capital, Inc. ("Broadcap")[1] hereby file this response to Petition

[1] Pursuant to Rule 29, Sup. Ct. Rules, the following information is provided: Syndicated Communications, Inc. has no parent corporation, and all of its subsidiary corporations are wholly-owned. The parent of Syncom Capital Corporation is Syndicated Communications, Inc., and Syncom Capital Corporation has no subsidiaries. The parent of Broadcast Capital, Inc. is Broadcast Capital Fund, Inc., and the sole subsidiary corporation of Broadcast Capital, Inc. is wholly-owned.

for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") entered on July 17, 1992 in No. 92-2542 dismissing for lack of jurisdiction the appeal by petitioner N. Walter Goins ("Goins") of the interlocutory order of the United States District Court for the District of Minnesota ("District Court") denying Goins's application for a default judgment.

I.

CONSTITUTIONAL PROVISIONS

This case does not involve any constitutional provisions.

II.

STATUTES INVOLVED

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . .

III.

COUNTERSTATEMENT OF THE CASE

A. The Complaint.

On or about February 18, 1992, petitioner Goins filed a complaint in the District Court against various parties, including respondents Syndicated Communi-

cations, its subsidiary Syncom, and Broadcap (hereinafter collectively "Banking Respondents"), which he thereafter served by mail. While the nature of Goins's claims against the Banking Respondents is unclear, his complaint mentions these defendants in four counts alleging, respectively, violations of antitrust laws (Count I), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. (Count II), and the Civil Rights Act, 42 U.S.C. §§ 1983, 1985 (Counts V and VII).

Goins filed a minor amendment to this complaint on February 23, 1992, amending by interlineation Paragraph 26 of the original complaint. On March 17, 1992, the Banking Respondents acknowledged receipt of the amended complaint. Their answer was therefore due on April 6, 1992.

B. The Removal To Bankruptcy Court.

On March 20, prior to the date that the answer of the Banking Respondents was due, three of the defendants (KTMA Acquisition Corp., Donald R. Johnston, and Larry B. Ricke) filed a notice of removal ("Notice of Removal") under Bankruptcy Rule 9027, removing the entire case to the United States Bankruptcy Court for the District Of Minnesota ("Bankruptcy Court"). The grounds for the notice were that KTMA Acquisition Corp. was the debtor in a Chapter 11 proceeding then pending in the Bankruptcy Court. Johnson was the trustee of the debtor, and Ricke was counsel to the trustee. The Notice Of Removal noted that Goins had appeared in that Chapter 11 proceeding and had filed six pleadings therein.

C. The Motion To Dismiss.

On April 6, 1992, the Banking Respondents filed in Bankruptcy Court where the action was then pend-

ing a motion to dismiss pursuant to Bankruptcy Rule 7012(b) for failure to state a claim and for lack of personal jurisdiction, with supporting documents, and noticed a hearing on that motion for May 1, 1992. Various affidavits were submitted with the motion to dismiss, and the motion noted that if the affidavits were considered, the motion should be treated as one for summary judgment.

On April 9, 1992, Goins filed in District Court a motion to strike all the pleadings in the case referring to or bearing the caption of the bankruptcy matter. On April 14, 1992, the United States Magistrate assigned to the case denied the motion to strike, reciting that the case had been removed to Bankruptcy Court.

On April 21, 1992, Goins filed in Bankruptcy Court a "Notice of Jurisdictional Objection," arguing that the Bankruptcy Court did not have jurisdiction over the action and, consequently, the Banking Respondents' motion to dismiss, for a variety of reasons. On May 4, 1992, the Bankruptcy Court issued an order ruling that it did not have jurisdiction over Goins's claims against the Banking Respondents and therefore denied the Banking Respondents' motion to dismiss. Petitioner's Appendix ("App") III, at 2. Upon receiving the Bankruptcy Court's order, the Banking Respondents immediately refiled their motion to dismiss in the District Court on May 4, 1992.

D. The Application For A Default Judgment.

On May 10, Goins filed an Application For A Default Judgment in the District Court. Goins's motion asserted that the District Court should enter a default

judgment because the Banking Respondents originally filed their motion to dismiss in Bankruptcy Court, to whence the action had been removed and was pending, rather than in the District Court. On May 26, 1992, the District Court denied sua sponte Goins's motion for a default judgment. Respondents' Appendix ("R. App.") A, at 2a. On May 29, 1992, the Bankruptcy Court remanded the case to the District Court.

E. Appeal Of The Interlocutory Order Denying Default.

On June 12, 1992, Goins appealed the District Court's interlocutory order denying his motion for a default judgment to the United States Court Of Appeals For The Eighth Circuit. R. App. B, at 3a. On July 8, 1992, the Banking Respondents moved to dismiss the appeal in the Eighth Circuit for lack of jurisdiction on the grounds that the denial of Goins's motion for a default judgment was not an appealable order. R. App. C, at 4a.

On July 17, 1992, the Eighth Circuit granted the Banking Respondents' motion to dismiss and ordered that Goins's appeal "be dismissed for lack of jurisdiction." App. I, at 2. On September 1, 1992, the Eighth Circuit denied Goins's petition for rehearing. App. IX, at 1. On November 30, 1992, Goins petitioned this Court for a writ of certiorari of the Eighth Circuit's dismissal of the appeal of the District Court's interlocutory order denying his motion for a default judgment.

F. Final Judgment And The Pending Eighth Circuit Appeal.

On October 10, the District Court entered an order treating the Banking Respondents' motion to dismiss as one for summary judgment and granting that mo-

tion. On November 12, 1992, Goins's noticed an appeal of this final order to the Eighth Circuit. R. App. D, at 6a. This appeal is now pending before the Eighth Circuit.

IV.

SUMMARY OF THE ARGUMENT

Goins's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied. The judgment as to which review is sought is a routine determination by the Eighth Circuit declining to accept a premature appeal from a non-appealable interlocutory order denying a motion for a default judgment. Moreover, the subject matter of the premature appeal is presently pending before the Eighth Circuit.

V.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Eighth Circuit's Routine Dismissal Of Goins's Premature Appeal Of An Interlocutory Order Raises No Issues For Which A Writ Of Certiorari Should Issue.

Goins's convoluted and opaque attempt to convert a simple and routine dismissal of his premature appeal of an interlocutory order into various Article III constitutional issues is meritless. The general appellate jurisdictional statute, 28 U.S.C. § 1291, provides that the courts of appeal shall have jurisdiction of "final decisions" of the district courts. It is blackletter law that an interlocutory order denying a motion for a default judgment is not such an appealable order. *Bird v. Reese*, 875 F.2d 256 (9th Cir. 1989) (court of appeals held it had no jurisdiction over appeal of district court

order denying motion for a default judgment because "such a denial is not a final appealable order"); *McNutt v. Cardox Corp.*, 329 F.2d 107, 108 (6th Cir. 1964) ("order denying a motion for a default judgment is not an appealable order"); 15A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3914.5 (2d ed. 1986).

Moreover, an order denying a motion for a default judgment does not satisfy the requirements of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because denial of a default judgment can "be reviewed on appeal from the court's final judgment on the merits." *Adult Film Ass'n of America v. Thetford*, 776 F.2d 113, 114-15 (5th Cir. 1985). Therefore, the Eighth Circuit correctly concluded that it did not have jurisdiction to entertain an appeal of the District Court's interlocutory order, and correctly dismissed Goins's appeal for lack of jurisdiction.

Accordingly, Goins's petition raises no issues for which a writ of certiorari should issue. There is no conflict between the circuits with respect to the appealability of the denial of a default judgment, and the Eighth Circuit's conclusion that the District Court's order denying the default judgment was a non-appealable interlocutory order was eminently correct. Rule 10, Sup. Ct. Rules.

B. The Issue With Respect To Which A Writ Of Certiorari Is Sought Is Presently Before The Eighth Circuit In A Separate Pending Appeal.

On October 10, 1992, the District Court granted the Banking Respondents (as well as the other defendants') motions for summary judgment, and dismissed Goins's state law claims. Judgment was en-

tered on October 13, 1992. On November 12, 1992, Goins appealed from that judgment to the Eighth Circuit, which appeal is now pending. R. App. D, at 6a.

That appeal incorporates all intermediate, interlocutory, and previously non-appealable orders of the District Court. Accordingly, the very claim as to which Goins's seeks a writ of certiorari—whether the United States District Court properly exercised its discretion in denying a motion for a default judgment—is presently pending before the Eighth Circuit.

VI.

CONCLUSION

The Eighth Circuit's routine dismissal for lack of jurisdiction of Goins's premature appeal of the District Court's interlocutory order denying a default judgment presents no issues for which a writ of certiorari should issue. In addition, in light of the complete lack of merit of Goins's petition, the Banking Respondents further request, pursuant to Rule 42, Sup. Ct. Rules, an award of double costs and their attorneys' fees in opposing Goins's petition.

WHEREFORE, the Banking Respondents respectfully request this Court to deny Goins's petition for a writ of certiorari, and further request this Court to award them double their costs and their attorneys' fees.

Respectfully submitted,

MICHAEL D. HAYS*
DOW, LOHNES & ALBERTSON
Suite 500
1255 23rd St., N.W.
Washington, D.C. 20037
(202) 857-2500

and

MICHAEL BERENS
KELLY & BERENS, P.A.
3720 IDS Center
Minneapolis, MN 55402
(612) 349-6171

Counsel For Respondents Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital, Inc.

**Counsel of Record*

Date: December 18, 1992

APPENDIX

RESPONDENTS' APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-92-154

N. Walter Goins,

Plaintiff,

v.

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 letter agreement of Alcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital Incorporated, a Virginia corporation; Donald R. Johnston, Larry B. Ricke, and Thomas J. Lallier,

Defendants.

O R D E R

This matter is before the Court on plaintiff's motion for entry of default judgment. However, this Court has already held that this action is properly before the bankruptcy court under either the automatic reference provisions of Local Rule 201, as authorized by 28 U.S.C. §§ 157(a) & 1334, or the filing of defendants' notice or removal under Bankr. R. 9027, *see Raff v. Gordon*, 58 B.R. 988, 990 (E.D. Pa. 1986); *Philadelphia Gold Corp. v. Fauzio* (*In re Philadelphia Gold Corp.*), 56 B.R. 87, 89-90 (Bankr. E.D. Pa. 1985); 1 *Collier on Bankruptcy* ¶ 3.01, at 3-92 n.153c (15th ed. 1991). Plaintiff's motion will therefore be denied.

IT IS ORDERED that plaintiff's motion for entry of default judgment is denied.

/s/ Harry H. McLaughlin
Judge Harry H. McLaughlin
United States District Court

DATED: May 26, 1992

RESPONDENTS' APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
MINNESOTA DISTRICT
FOURTH DIVISION

Civil No. 4-92cv154 (HHM)

N. Walter Goins,

Plaintiff,

vs.

Dale W. Lang, et al.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that N. Walter Goins, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order denying Plaintiff's motion or application for default judgment against Defendants Syndicated Communications, Inc. and Broadcast Capital Corp. entered in this action by the Court on twenty-sixth day of May, 1992.

June 12, 1992

Respectfully submitted,

/s/ Albert Turner
ALBERT TURNER GOINS
(126159)
Attorney for N. Walter Goins
1729 East County Road D
Maplewood, MN 55109
(612) 777-4757 tel.

RESPONDENTS' APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States District Court
File No.: Civil 4-92-154

N. Walter Goins,

Appellant,

v.

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm, KTMA Acquisition Corp., a New York corporation, and Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc., of Washington, D.C. and its subsidiary, Syncom Capital Corp., and Broadcast Capital Incorporated, a Virginia corporation, and Donald R. Johnston, Larry B. Ricke and Thomas J. Lallier,

Appellees.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Appellees Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Incorporated, hereby move the court to dismiss the appeal in the captioned matter. Appellant has appealed from an order of the United States District Court for the District of Minnesota denying his motion for default judgment. Such an order is not an appealable final order under 28 U.S.C. § 1291. Accordingly, this court does not have jurisdiction of this appeal.

Dated: July 8, 1992

KELLY & BERENS, P.A.

/s/ Michael Berens
Michael Berens
Attorney No. 702X
Carol E. Baker
Attorney No. 218212
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

Of Counsel:

Michael D. Hays
John H. Pomeroy
Shawn M. Bentley
Down, Lohnes & Albertson
Suite 500
Washington, D.C. 20037
(202) 857-2500

RESPONDENTS' APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil 4-92-154

N. Walter Goins,

Plaintiff,

v.

Dale W. Lang, et al.,

Defendants.

NOTICE OF APPEAL

Plaintiff, N. Walter Goins, hereby notices his appeal to the United States Court of Appeals for the Eighth Circuit pursuant to the Federal Rules of Appellate Procedure as to the judgment of the United States District court for the District of Minnesota entered on October 13, 1992 excepting the portion of that judgment granting summary judgment in favor of defendants Donald R. Johnston and Larry B. Ricke, and defendant Thomas J. Lallier as to all of plaintiff's federal claims against Donald R. Johnston and Larry B. Ricke, and Thomas J. Lallier.

Dated: November 12, 1992

Respectfully submitted,

/s/ Albert Turner Goins, Sr.
Albert Turner Goins, Sr.
Attorney for Plaintiff
MN ID #126159
1729 East County Road "D"
Maplewood, MN 55109-5305
tel. (612) 777-4757